Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 90-7675

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

R.A.V.,
Petitioner,

v.

ST. PAUL, MINNESOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF FOR PEOPLE FOR THE AMERICAN WAY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

RICHARD S. HOFFMAN
(Counsel of Record)
KEVIN J. HASSON
JON A. BRILLIANT
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

ELLIOT M. MINCBERG
DEANNA R. DUBY
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

Counsel for Amicus Curiae People for the American Way

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE MINNESOTA SUPREME COURT'S CONSTRUCTION OF THE ST. PAUL ORDINANCE IS BINDING ON THIS COURT 5

II. AS CONSTRUED, THE ST. PAUL ORDINANCE IS CONSTITUTIONAL 9

A. The Ordinance, As Construed, Is Not Overbroad 10

1. *Fighting Words* 13

2. *Incitement to Imminent Lawlessness* . 15

B. The Ordinance, As Construed, Is Not Unconstitutionally Vague 17

C. The Ordinance Is Not A Prohibited Content-Based Regulation 20

CONCLUSION 28

TABLE OF AUTHORITIES

CASES **PAGE**

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 20
Blount v. *Rizzi*, 400 U.S. 410 (1971) 20
Board of Airport Commissioner v. *Jews for Jesus,Inc.*, 482 U.S. 569 (1987) 12
Brandenberg v. *Ohio*, 395 U.S. 444 (1969) . . . . . *passim*
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) . . . . . *passim*
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 16
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 4, 10, 13
Cohen v. *California*, 403 U.S. 15 (1971) . 9, 14
Colten v. *Kentucky*, 407 U.S. 104 (1972) . . . 17
Cox v. *Louisiana*, 379 U.S. 536 (1965) 27
Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961) 6
Erznoznik v. *Jacksonville*, 422 U.S. 205 (1975) 27
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 25
Gooding v. *Wilson*, 405 U.S. 518 (1972) . . . . . *passim*
Hamling v. *United States*, 418 U.S. 87 (1974) 18
Herbert v. *Louisiana*, 272 U.S. 312 (1926) 6

Hess v. *Indiana*, 414 U.S. 105 (1973) 15, 16
Hicks v. *Feiock*, 485 U.S. 624 (1988) 7
Houston v. *Hill*, 482 U.S. 451 (1987) 11
In re R.A.V., 464 N.W.2d 507 (Minn. 1991) . . . . . *passim*
In re S.L.J., 263 N.W.2d 412 (Minn. 1978) . . . . . *passim*
Kolender v. *Lawson*, 461 U.S. 352 (1983) 17
Kucharek v. *Hanaway*, 902 F.2d 513 (7th Cir. 1990) 26
Lewis v. *New Orleans*, 408 U.S. 913 (1972) 14
Lewis v. *New Orleans*, 415 U.S. 130 (1974) 12, 14
Lindsley v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) 6
Members of City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) . . . 10, 20, 22
Michigan v. *Long*, 463 U.S. 1032 (1983) 5
Miller v. *California*, 413 U.S. 15 (1973) 19
Murdock v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) 5
New York v. *Ferber*, 458 U.S. 747 (1982) 10, 25
Norwell v. *City of Cincinnati*, 414 U.S. 14 (1973) 13
Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 17
Papish v. *Board of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973) 27

Police Department v. *Mosley*, 408 U.S. 92 (1972) 27
Smith v. *Goguen*, 415 U.S. 566 (1974) 17
Spence v. *Washington*, 418 U.S. 405 (1974) 9
Street v. *New York*, 394 U.S. 576 (1969) . . . 12
Terminiello v. *City of Chicago*, 337 U.S. 1 (1949) 2, 6
Texas v. *Johnson*, 491 U.S. 397 (1989) 10, 20, 21
United States Civil Serv. Comm'r v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548 (173) 18
United States v. *Eichman*, 110 S. Ct. 2404 (1990) 21
United States v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971) 5
United States v. *O'Brien*, 391 U.S. 367 (1968) 26
Virginia v. *American Booksellers Association*, 484 U.S. 383 (1988) 11
Weightman v. *Clark*, 103 U.S. 256 (1880) . 6, 8
West v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940) 7
Winters v. *New York*, 333 U.S. 507 (1948) 6, 18
Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) 23

CONSTITUTIONAL PROVISIONS:

Amendment I . . . . . *passim*
Amendment XIV 9, 10, 29

STATUTES AND ORDINANCES:

Minn. St. §609.72 (1990) 9, 14
St. Paul, Minn., Ordinance §292.02 (1990) 8, 28

INTEREST OF *AMICUS CURIAE*

This brief is submitted on behalf of People for the American Way ("People For"), a non-partisan, education-oriented citizens' organization established to promote and protect civil liberties and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, the organization now has over 300,000 members nationally. People For's own education and advocacy activities depend fundamentally on First Amendment rights, and it has a broad concern for protecting such freedoms in our country. People For has submitted *amicus* briefs to this Court in support of free expression in a number of its recent cases, including *Texas* v. *Johnson* and *United States* v. *Eichman*.

At the same time, the organization is devoted to promoting religious and racial tolerance and pluralism. People For believes that this case presents the opportunity to draw an appropriate line between a state's right to regulate a narrowly defined category of hate-crime related to unprotected conduct, while at the same time preserving the important First Amendment safeguards for expressive conduct recognized by this Court in *Johnson* and *Eichman*. People For believes that the decision of the Minnesota Supreme Court, narrowly construing the ordinance enacted by the City of St. Paul, is a rational and constitutional response to this difficult problem.

This brief is filed pursuant to Rule 37.3 of the Rules of this Court. The parties have consented to its submission with letters on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

Despite petitioner's attempt to make it so, this case is not about the ability to legislate politically correct speech. Rather, the question presented is whether a state law, as construed by the state's highest court, may constitutionally punish hate-crime related expressive conduct that (1) is "directed to inciting or producing imminent lawless action and is likely to produce" that result, or that (2) constitutes "fighting words." *In re R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991). We believe that it may without running afoul of the First Amendment.

People For agrees with petitioner that, if considered without limitation, the prohibition in the City of St. Paul ordinance of conduct that "arouses anger, alarm or resentment in others" cannot withstand constitutional scrutiny. But that is not the question presented here. Under well settled precedent, the beginning of this Court's analysis is the construction of the St. Paul ordinance by Minnesota's highest court. That limiting construction is an application "of state law that is as binding on [this Court] as though the precise words had been written into the ordinance." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949).

As so construed, the ordinance is neither unconstitutionally vague nor overbroad. Contrary to petitioner's suggestion, the construction by the Supreme Court of Minnesota does not merely permit that conduct which is constitutionally protected and prohibit that which is not. Rather, the lower court's decision gives meaning and content to the prohibition on conduct designed to

"arouse anger, alarm or resentment in others" by reason of race, color, creed, religion, or gender, by limiting that prohibition to narrowly proscribed situations where the speaker's words either incite listeners to imminent lawless conduct or are such a personal attack on the listener that they are likely to provoke the listener to a physical response. The meaning of these terms, as petitioner recognizes, are well established in the case law and petitioner's right to free expression can be fully protected by appropriate jury instructions applying the law, as construed.

Nor is the ordinance, as construed, overbroad. It now permits prosecution only in two narrowly limited circumstances and for conduct long held to be unprotected by the First Amendment. First, the ordinance forbids use of a symbol, object, appellation, characterization or graffiti where it is designed and is likely to incite imminent lawless action. At least since *Brandenberg v. Ohio*, 395 U.S. 444 (1969), this Court has held that even pure speech, let alone expressive conduct such as burning an object on the private property of another, that is designed and is likely to incite a riot, is subject to prohibition. There can be little doubt that if R.A.V. donned a hood and burned a cross near the front door of the home of an Afro-American family while yelling "burn the niggers out" to a group of like-minded, hooded men, he could be prosecuted under *Brandenberg*. Indeed, the petitioner concedes as much by recognizing that, under proper facts, a cross-burner could be prosecuted under a Minnesota statute prohibiting "terroristic threats." Petitioner's Brief at 13 & n.7. Similarly, there is little doubt that R.A.V. could constitutionally be prosecuted under

Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942), if he walked up to the owner of the home and insulted him with racial (or other) personal invectives that challenged him to a physical confrontation.

Given the Minnesota Supreme Court's interpretation of the ordinance, the ultimate question in this case will be whether the circumstances of R.A.V.'s burning of a cross on the lawn of this family amounted to such a personal attack or threatened to incite "an immediate breach of the peace." These are questions that cannot and should not be answered by this Court on this record, which concerns only a facial challenge to the St. Paul ordinance.

Finally, the contention that the ordinance and the Minnesota Supreme Court's construction of it are constitutionally flawed because they amount to a "content based" regulation on expressive conduct ignores the impact of this definitive limiting construction. *All* analyses of whether particular words or actions constitute an incitement to riot or are likely to incite an immediate breach of the peace must of necessity focus on what is said or done by the speaker. Words and actions do not have meaning in a vacuum. They must be analyzed in light of history and human experience. The Minnesota Supreme Court's recognition that cross-burning is a known symbol of racial and religious violence and hatred is not a statement that *all* such actions may be constitutionally prohibited -- they may not -- but merely a recognition that what we know from our history need not be ignored when determining whether a particular act falls into that narrow category of expressive conduct that,

in a particular case, may be prohibited under the settled principles of this Court. Nor does the law's focus on incitement to immediate racial or religious violence, as opposed to all incitement, create a prohibited content-based regulation. Within the ambit of *unprotected* expression constituting incitement or fighting words -- expression that is outside the broad reach of the First Amendment -- state legislatures are free to single out particular evils subject to special sanctions.

The decision in this case should be affirmed and remanded to the trial court for a development of the factual record and a determination whether R.A.V.'s conduct violates the ordinance, as construed.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S CONSTRUCTION OF THE ST. PAUL ORDINANCE IS BINDING ON THIS COURT

This Court lacks jurisdiction to decide questions of state law. *See, e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1874). The Court also "lack[s] jurisdiction authoritatively to construe state legislation," *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972) (*quoting United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971)), and is bound by the construction given a state statute by the highest court of that state. A state court's "construction of [an] ordinance is a ruling on a question of state law that is as binding on [this Court] as though the

precise words had been written into the ordinance." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949).

This is true even when the state court's "construction" is more in the nature of an amendment. As this Court has often stressed, the state court's "authoritative interpretation . . . 'puts these words in the statute as definitively as if it had been so amended by the legislature.'" *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278, 285 (1961) (*quoting Winters* v. *New York*, 333 U.S. 507, 514 (1948)). *See also Herbert* v. *Louisiana*, 272 U.S. 312, 317 (1926); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 73 (1911); *Weightman* v. *Clark*, 103 U.S. 256, 260 (1880).

It is true, moreover, even where the state court's construction itself creates constitutional difficulty -- or actually serves to invalidate an otherwise *constitutional* enactment. Thus, in *Terminiello* the Court reversed a conviction for disorderly conduct because the state trial court had instructed the jury that the statutory phrase "breach of the peace" included even "misbehavior [that] stirs the public to anger [or] invites dispute . . . ." *Terminiello*, 337 U.S. at 3. Although there was a substantial question whether Terminiello's speech constituted fighting words that made his conviction entirely proper, the Court did not reach that question but instead reversed the conviction because the ordinance under

which he was convicted was, as construed, unconstitutional. *Id.* at 3-4.[4/]

Finally, this Court is bound even when it could be argued that the state court's construction appears manifestly wrong. *See, e.g.*, *Hicks* v. *Feiock*, 485 U.S. 624, 629 (1988) ("We are not at liberty to depart from the state appellate court's resolution of these issues of state law . . . [even though] petitioner marshals a number of sources in support of the contention that the state appellate court misapplied [that] law . . . .") (footnote omitted); *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223,

---

4/ The Court has likewise properly declined to supply a saving construction for a state statute in danger of invalidation. Thus, in *Gooding* the Court struck down a Georgia statute that prohibited the "use to or of another, and in his presence . . . [of] opprobrious words or abusive language tending to cause a breach of the peace . . . ." *Gooding*, 405 U.S. at 519. The Court found that the statute could only withstand "attack upon its facial constitutionality if, as authoritatively construed by the Georgia courts, it is not susceptible of application to speech . . . protected by the First and Fourteenth Amendments . . . . Only the Georgia courts can supply the requisite construction, since of course we lack jurisdiction authoritatively to construe state legislation." *Id.* at 520 (citations and quotation omitted).

237-38 (1940).[2] The starting point of this Court's analysis of St. Paul, Minn. Ordinance §292.02 (1990), is thus the construction placed on that ordinance by the Minnesota Supreme Court, namely that the ordinance's prohibition of expression that "arouses anger, alarm or resentment in others . . . ." reaches only such conduct that also amounts to fighting words or incitement to imminent lawless action. *In re R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).[3]

---

[2] The only exception to the requirement of absolute deference to state-court construction of state law is when some aspect of the state court's interpretation itself violates federal law. *See Weightman v. Clark*, 103 U.S. at 260 ("As a rule, we treat the construction which the highest court of a state has given a statute of the State as part of the statute itself. It is only when, by giving such construction a retroactive effect, it will invalidate contracts which in our opinion were lawfully made, that we disregard them."). No such circumstance exists here.

[3] Although, as noted, this construction is binding on this Court regardless of its apparent correctness, it nonetheless bears emphasis that the construction is consistent with prior Minnesota precedent. The Minnesota Supreme Court construed the ordinance in light of *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978), where the Minnesota Supreme Court upheld a disorderly conduct statute that employed language (continued...)

II. AS CONSTRUED, THE ST. PAUL ORDINANCE IS CONSTITUTIONAL

There is little question that the conduct which the St. Paul disorderly conduct ordinance is intended to regulate is a form of expression implicating the First and Fourteenth Amendments. *Spence* v. *Washington*, 418 U.S. 405, 410 (1974). Burning a cross or painting a swastika is certainly an activity which is perpetrated with an "intent to convey a particularized message" and with a substantial "likelihood . . . that the message [will] be understood by those who view it." *Id.* at 410-11. And this Court has often held that the government cannot ban the expression of an idea, through conduct or speech, merely because society finds that idea offensive or

---

[3](...continued)
strikingly similar to the St. Paul ordinance. The statute upheld in *In re S.L.J.* prohibited "offensive" language "tending reasonably to arouse alarm, anger or resentment in others." *Id.* at 415 (citing Minn. Stat. §609.72 (1990)). It was constitutional, the court held, because it would be construed to be limited to "fighting words" -- words that constitute "such personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Id.*, *quoting Cohen* v. *California*, 403 U.S. 15, 20 (1971). The St. Paul City Council should, of course, be presumed to have known of the state Supreme Court's construction of that statute when it later chose essentially identical language for its ordinance.

politically incorrect. *See,e.g., Texas* v. *Johnson,* 491 U.S. 397, 398 (1989); *Members of City Council* v. *Taxpayers for Vincent,* 466 U.S. 789, 804 (1984). As construed, however, the St. Paul ordinance avoids these infirmities. By limiting application of the St. Paul ordinance to "fighting words," *see Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), and to speech which incites or is very likely to incite an audience to "imminent lawless action," *see Brandenberg* v. *Ohio,* 395 U.S. 444 (1969), the Minnesota Supreme Court has construed the ordinance to cover only conduct that may be restricted without violating the First and Fourteenth Amendments.

A. The Ordinance, As Construed, Is Not Overbroad

Although the overbreadth doctrine provides an important safeguard for dealing with statutes invalid on their face, the doctrine also has important limitations. Finding a statute void for overbreadth is "strong medicine," which is used sparingly and only where there is no alternative solution. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613 (1973); *see also New York* v. *Ferber,* 458 U.S. 747 (1982); *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978).

As explained in *Broadrick:*

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting

> construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. . . . Facial overbreadth has not been invoked when a limiting construction *has been* or *could be* placed on the challenged statute.

413 U.S. at 613 (emphasis added). Thus, in *Broadrick,* the Court held that "the Oklahoma statute, [at issue there,] *when authoritative, administrative constructions are accepted,* is not invalid under such a rule." *Id.* at 616 n.14 (emphasis added). Here, as in *Broadrick*, the statute "has been" limited by the court with the final word on its meaning -- the Minnesota Supreme Court.[4/]

[4/] For this reason, petitioner's reliance on cases holding that "the statute must be 'readily susceptible' to the limitation; [the Court] will not rewrite a state law to conform it to constitutional requirements," *Virginia* v. *American Booksellers Ass'n.*, 484 U.S. 383, 397 (1988), is misplaced. In each of the cases relied on by petitioner, the Court first considered whether the state court had offered a limiting construction to a potentially overbroad statute. Only where none existed did the Court then apply its own judgment and determine whether such a limiting construction was available. *See, e.g., Houston* v. *Hill*, 482 U.S. 451, 466 (1987) (no limiting construction by state courts applying ordinance criminalizing any act to

(continued...)

Here, the question of whether a limiting construction is "available" is not open -- the construction has already been made. Thus, the question is whether the ordinance remains "overbroad" because it prohibits expression likely to incite imminent lawless actions or constituting "fighting words."

4/(...continued)

"oppose, molest, abuse or interrupt" a police officer in performance of his duty, and declining to abstain and certify question to Texas court); *Board of Airport Comm'r. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75 (1987) (recognizing that state court had not had opportunity to limit a regulation prohibiting all "First Amendment activity" in public airport); *Lewis v. New Orleans*, 415 U.S. 130, 135-36 (1974) (striking down city ordinance making it unlawful to direct any "obscene or opprobrious language" to a police officer); *Gooding*, 405 U.S. at 528 (recognizing court would be bound by limiting construction of an abusive language statute, but holding that no such construction had been made by prior state cases); *Street* v. *New York*, 394 U.S. 576 (1969) (striking down flag burning statute). Indeed, in *Lewis* the Court expressly recognized that the statute could have been saved by a construction limiting the ordinance to "fighting words," as defined in *Chaplinsky*, but that the state had expressly rejected such a construction. *Lewis*, 415 U.S. at 135-36.

1. *Fighting Words*

The "fighting words" doctrine was originally set forth in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). The facts in this case are remarkably similar to those in *Chaplinsky*. There, the New Hampshire Supreme Court upheld, against an overbreadth challenge, the constitutionality of a statute which stated: "no person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." On its face, that statute, like the St. Paul ordinance, clearly prohibited constitutionally protected speech, but the Supreme Court of New Hampshire narrowed the statute's application by holding that it applied only to fighting words -- words that, when addressed to an individual, would tend to provoke an average person to breach the peace. This Court affirmed, holding that conduct that tends to incite immediate violence is outside constitutional protection. *Id.* at 572. Put simply, *Chaplinsky* permits a state to punish for "words likely to cause an average addressee to fight." *Id.*

Petitioner correctly points out that the "fighting words" exception has been consistently restricted by the Court to extremely personally offensive insults,5/

5/ *Norwell* v. *City of Cincinnati*, 414 U.S. 14, 16 (1973).

directed to an individual, not a group,[6] present at the time of the verbal attack.[7] Indeed, these same limitations are also well-established in Minnesota law. In *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978), the Minnesota Supreme Court confronted a statute prohibiting, among other things, "offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse *alarm, anger, or resentment* in others." *Id.* at 415 (emphasis added) (citing Minn. Stat. §609.72 (1990)). Just as in *In re R.A.V.*, the Minnesota Supreme Court found the statute to be unconstitutionally overbroad on its face, but upheld the statute by narrowly construing it to apply only to "fighting words." The court in *S.L.J.* made clear what it meant by "fighting words": those "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," 263 N.W.2d at 418 (*citing Cohen* v. *California*, 403 U.S. 15 (1971)). Presaging its holding in this case, the Minnesota court went on to make clear that:

> Words which do not fit this definition, no matter how offensive they may be, are not subject to criminal sanctions; and, if the statute being scrutinized punished more than "fighting words," it must either be struck down as facially overbroad or, if possible, construed narrowly to make it constitutional. *Id.*

---

[6] *Gooding*, 405 U.S. at 523.

[7] *Lewis* v. *New Orleans*, 408 U.S. 913, 913 (1972) (Powell, J., concurring).

Given this clear understanding of the limitation now present in the St. Paul ordinance, petitioner can do little more than argue that *Chaplinsky* itself should be overruled. But that is an argument petitioner refuses to make and a question he did not present to this Court for review. The remaining question here is therefore factual -- whether the circumstances of R.A.V.'s cross-burning on the lawn of a private home in the presence of its owner, meet the narrow category of conduct covered by *Chaplinsky* and its progeny. That is a question to be answered on remand.

2. *Incitement to Imminent Lawlessness.*

States may proscribe action that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *See Brandenberg* v. *Ohio*, 395 U.S. 444 (1969). Although not permitting use of the charge of "imminent lawless action" as a pretext to forbid the advocacy of ideas which the state does not approve of, *see Hess* v. *Indiana*, 414 U.S. 105 (1973), the First Amendment does not protect advocacy that is essentially directed toward encouraging an immediate lawless act. *Brandenberg*, 395 U.S. at 447. The *Brandenberg* doctrine requires both incitement *and* a present or imminent danger.

Where *Chaplinsky* focuses on the impact on the target of the speech or conduct, *Brandenberg* requires that a court look to the effect on the sympathetic audience. The feared lawless action by listeners must be truly imminent, not a vague potential that might occur at some distant date in the future. *See, e.g., Hess* (Court held that the words "We'll take the fucking street later," and "We'll take the fucking street again" failed to meet the imminence requirement of *Brandenberg*). Nevertheless, a person can be convicted for breaching the peace if that person "commit[s] acts or make[s] statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended." *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940).

Petitioner spends little time challenging the state's incorporation of the *Brandenberg* doctrine into the ordinance because there can be no doubt that inciting a riot, lynching, burning of a house or other violent acts are not constitutionally protected. From the record in this case, all the Court knows is that between 1:00 and 3:00 a.m. a group of young white males burned crosses in front of the home of the only black family on the block where the incident occurred. If the facts of this case, when tried, demonstrate that the defendant by his actions and any accompanying words was encouraging his companions to break the criminal law and commit further violence, and that the threat of such violence was real and immediate, then the ordinance may be constitutionally applied to petitioner. If there is no suggestions that petitioner was creating a threat of "imminent lawless action," then the ordinance, as construed, does not apply to him. In either event, there is no basis for this Court

to strike down the statute on a facial challenge before those facts are developed.

B. The Ordinance, As Construed, Is Not Unconstitutionally Vague

The void-for-vagueness doctrine requires that the language of a statute be sufficiently precise that people of ordinary intelligence need not guess at its meaning. Moreover, the statute must also be narrowly defined or authoritatively construed so that it does not encourage arbitrary and discriminatory enforcement. *See Kolender* v. *Lawson,* 461 U.S. 352 (1983); *Smith* v. *Goguen*, 415 U.S. 566, 572 (1974); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 168 (1972).

Nevertheless, like the overbreadth doctrine, the vagueness doctrine does not require perfection in statutory drafting. It is not designed to enable the courts to eliminate laws that are not perfectly drawn. *See Colten* v. *Kentucky*, 407 U.S. 104, 110-11 (1972) (upholding constitutionality of Kentucky disorderly conduct statute after the Kentucky Court of Appeals narrowed its breadth). It is intended to eliminate only those laws which cannot be, or have not been, properly reformed. Were it otherwise, no law would be safe. As this Court noted in *Broadrick*:

> Words inevitably contain germs of uncertainty. . . [ ] there are limitations in the English language with respect to being both specific and manageably brief, and it seems to

> us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Broadrick v. Oklahoma, 413 U.S. at 608 (*citing United States Civil Serv. Comm'r* v. *National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973)).

It is not enough, then, to find words that, without context, are ambiguous. If the words of a statute have a precise meaning either in the context of the statute, *Winters* v. *New York*, 333 U.S. 507, 518 (1948), or as construed by previous case law, *Hamling* v. *United States*, 418 U.S. 87, 114-16 (1974), it generally should not be held void for vagueness. Thus, in *Hamling* a statute that merely used the word "obscene," without defining that term, was not unconstitutionally vague because the word "obscene" had authoritatively been construed by prior cases. *Id.* at 118-19.

By this test, the St. Paul ordinance, as construed by the Minnesota Supreme Court, is constitutionally sound. It proscribes only "fighting words" and speech that incites a crowd to "imminent lawless action." As discussed above, the phrases "fighting words" and "incitement to imminent lawless action," have distinct meanings developed by case law beginning with *Chaplinsky*, fifty years ago. Each of these phrases has

come to define a very specific type of conduct or speech that states are permitted to proscribe. The meanings given by case law to "fighting words" and "incitement to imminent lawless action" are sufficiently established that the average citizen has fair notice of what conduct is restricted by a law banning those categories of speech. Likewise, because the meaning of "fighting words" and incitement to "imminent lawless action" are so well ensconced in law, a statute or authoritative construction using those phrases invokes very specific guidelines, which prevent law enforcement officers from applying the statute capriciously.

It is clear that the Minnesota Supreme Court intended that the St. Paul ordinance be construed to ban only speech which creates "anger, alarm, or resentment" by reason of race, color, creed, religion or gender to the degree that it constitutes "fighting words" or "imminent incitement to lawless action," as those phrases have been authoritatively interpreted by this and other courts.

The fact that it may not always be easy for a police officer to determine exactly what constitutes "fighting words" or what constitutes "incitement to imminent lawless action," is not a constitutional impediment. Indeed, this Court in the obscenity area has permitted a variety of statutes purporting to limit lewd or pornographic speech under the standards expressly requiring a case-by-case analysis of the content of the speech. *See, e.g., Miller* v. *California*, 413 U.S. 15 (1973). The fact that it may be difficult to draw the line between what is obscene (unprotected speech) and what is not, does not mean obscenity cannot be regulated. *See, e.g., Miller*,

413 U.S. at 15; *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). So, too, the fact that display of objects, including a burning cross or Nazi swastika, may be protected in certain situations, does not make it "vague" to ban their use when such use is intended to incite others to imminent lawless action or when such use is directed to a particular individual in a circumstance constituting fighting words.

C. The Ordinance Is Not A Prohibited Content-Based Regulation

Petitioner complains that the St. Paul ordinance lists, by way of example, certain objects, and restricts its application to conduct having an impact on others by reason of "race, color, creed, religion or gender." Petitioner contends that the ordinance therefore "censor[s] expression associated with unpopular minorities." Petitioner's Brief at 10.

Petitioner is mistaken.[8/] Cross-burning and

[8/] We agree, of course, that if the St. Paul ordinance did censor minority views, it would clearly be unconstitutional. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). This Court made clear in *Texas* v. *Johnson*, 491 U.S. 397 (1989), that states may not regulate expressive conduct where that regulation is for the purpose of suppressing even the most repugnant ideas. But that (continued...)

the display of swastikas are listed in the ordinance merely as examples of potentially prohibited conduct. The text prohibits display of *any* symbol or object under circumstances likely to incite imminent violence, or constituting fighting words, on the basis of race, creed, religion or gender. It applies regardless of the actor's particular viewpoint. It applies as much to a Jew brandishing the Star of David and inciting an attack on a family of German descent as a Nazi provoking others to attack a Jew. Unlike, for example, the statutes struck down in *Texas* v. *Johnson*, 491 U.S. 397 (1989), and *United States* v. *Eichman*, 110 S. Ct. 2404 (1990), which were restricted to desecration of a *particular* symbol -- the American Flag -- and thereby punished those critical of that symbol, the instant ordinance displays no bias based on point of view.[9/] The ordinance does not "favor

---

[8/](...continued)
is not what this ordinance does. Petitioner's argument on this point thus not only ignores the state court's limiting construction, it ignores the ordinance itself.

[9/] This case is fundamentally different than *Johnson* and *Eichman* in several ways. First, as noted above, *Johnson* and *Eichman* involved statutes restricted to a particular symbol and therefore related only to those critical of the idea embodied by that symbol. Second, as applied to the defendants in those cases, the statutes were clearly being used to attack the idea being expressed without reference to any (continued...)

some viewpoints or ideas at the expense of others." *Vincent*, 466 U.S. at 804. Thus, the ordinance cannot fairly be characterized as a "censorial statute directed at particular groups and viewpoints." *Broadrick*, 413 U.S. at 616.

Petitioner nevertheless claims the ordinance is content-based because it focuses on race, color, creed or gender, and that such focus defeats the ability to narrow the statute to fighting words or incitement. Petitioner's argument puts the cart before the horse. As the ordinance has been authoritatively construed, its focus on the nature of the symbol and the particular categories listed is permissible for two reasons.) First, examining the "content" of the speech is necessary to determine whether the speech crosses the line between protected expression and impermissible incitement or fighting words. Second, because the ordinance is limited to breaches of the peace, it does not regulate protected speech at all. The legislature is surely free to decide that a particular category of certain *unprotected* conduct is worthy of special sanction.

[2/](...continued)
secondary effect -- the threat of violence by the sympathetic listener or the recipient of an insult. Thus, the state statute in *Johnson* and the federal statute in *Eichman* were not limited to regulating conduct outside the protection of the First Amendment.

As explained in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976):

> The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment."

In the area of obscenity, "any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area." *Id.* at 70. So, too, here, no statute could realistically prohibit activity likely to cause a breach of the peace without focusing on the communicative message being conveyed by the speech or expression. The Minnesota Supreme Court's recognition that cross-burning "is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy," *In re R.A.V.*, 464 N.W.2d 507, 508 (Minn. 1991), is *not* a statement that all cross-burning can be outlawed. Rather it is a recognition that this particular symbol conveys a message and has a meaning relevant to determining whether, in the circumstances, petitioners' actions crossed

the line between the protected expression of an obnoxious opinion and an imminent threat to breach the peace. Indeed, the Minnesota court was explicit that a ban on cross-burning or the display of any symbol, if it did not consider the context in which the conduct occurred, would be unconstitutional. *Id.* at 510. It is only when the prohibition is tied to the legitimate goal of protecting the public order from imminent breaches of the peace that the display of any expressive symbol may be prohibited. *Id.* Indeed, in this area -- as in obscenity, libel and other "expressive" conduct or speech falling outside the realm of First Amendment protection -- it is the content of the act or speech that makes it subject to punishment.

A state is free to single out particular types of fighting words or particular categories of incitement for special sanction. The role of the courts is to ensure that the legislature does not inhibit protected expression; how states choose to deal with conduct *not* protected by the First Amendment is a matter of legislative choice. Thus, while all obscenity is outside the protection of the First Amendment, individual states may choose to focus on particular types of obscenity, such as displays of child pornography, bestiality or the like and permit displays that might otherwise be deemed obscene. As stated in

New York v. *Ferber*, 458 U.S. 747, 760-61 (1982):

> Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.

So, too, states may set their own standards for libel and slander, so long as they meet the minimum requirement of fault established in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Legislatures frequently design laws to attack specific aspects of social problems. As long as the legislature acts constitutionally, the courts must defer to the choices of democratically elected representatives.[10/]

[10/] The argument that Minnesota has other statutes that (continued...)

Although petitioner's brief does not address the issue of whether a state may engage in differential regulation of unprotected conduct, the issue is addressed in the *amicus* brief of Center for Individual Rights ("Center"). Center contends that although a state may prohibit all "fighting words" it may not select particular fighting words for special sanction. Center's Brief at 10. The cases it cites from this Court do not support that proposition.[11/]

[10/](...continued)

proscribe the conduct engaged in by R.A.V., Petitioner's Brief at 13-14, is irrelevant to determining the constitutionality of the ordinance before this Court. The States are not restricted from adopting laws that prohibit cross burning and other acts in a context where they threaten a breach of the peace. This Court has stated that "it has never been suggested that there is anything improper in [a legislature] providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest." *United States* v. *O'Brien*, 391 U.S. 367, 380 (1968).

[11/] Center relies on dicta in one lower court case, *Kucharek* v. *Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), suggesting that a state may not select certain types of obscenity to regulate while permitting other obscene speech. That statement is simply wrong. The suggestion that a state may not "disfavor" a particular obscene message for, by example, applying (continued...)

In each of those cases the Court confronted "time, place and manner" restrictions that impermissibly differentiated between types of protected First Amendment activity. Because time, place and manner regulations permit restrictions on where, when and how *protected* activity or speech may take place for reasons *independent* of the content of the speech, they must be content neutral. *Police Dep't* v. *Mosley*, 408 U.S. 92, 99 (1972). Thus, in *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 208 (1975), the Court began its discussion of a regulation requiring screening from public view only movies showing nudity in drive-in theatres with the statement that "[a]ppellee concedes that its ordinance sweeps far beyond the permissible restraints on obscenity and thus applies to films that are *protected by the First Amendment*." (Citations omitted) (emphasis added). Similarly in *Mosley* and *Cox* v. *Louisiana*, 379 U.S. 536 (1965), purported time, place and manner restrictions on picketing which differentiated among picketers on the basis of content were impermissible because the picketing at issue "plainly involves expressive conduct within the protection of the First Amendment." *Mosley*, 408 U.S. at 99. And in *Papish* v. *Board of Curators of the Univ. of Missouri*, 410 U.S. 667, 670 (1973), the Court made clear "neither

---

[11/](...continued)

a stricter or additional penalty, is directly contrary to *Ferber*. In support of that statement, Judge Posner cited the very cases relied on by Center, without recognizing that all of those cases involve regulations of *protected* speech or conduct.

the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected." This Court has never suggested that there are constitutional limits on a state's right to regulate conduct outside the scope of the First Amendment.

CONCLUSION

Petitioner and supporting *amici* incorrectly suggest that a state may not regulate hate-crime related expression in statutes specifically aimed at such expression, even where those statutes are narrowly tailored to address a legitimate state interest in punishing only expression *outside* the realm of First Amendment protection. Where, as here, a law is authoritatively construed to apply only in situations involving incitement to imminent lawless action or "fighting words," the right to free expression is fully protected and the law does not offend the Constitution. For the foregoing reasons, the decision of the Minnesota Supreme Court should be affirmed, and this Court should hold that St. Paul, Minnesota Ordinance §292.02, as construed, does not

violate the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

Richard S. Hoffman
(Counsel of Record)
Kevin J. Hasson
Jon A. Brilliant
Williams & Connolly
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Elliot M. Mincberg
Deanna R. Duby
People for the
American Way
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

Counsel for *Amicus Curiae*
People for the American Way

August 23, 1991